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IN THE

Supreme Court of the United States

October Term, 1964

No. 500

SANFORD E. ADAY, WALLACE DEORTEGA MAXEY and JACK A. LINDSAY,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, First Appellate District, Division One, State of California.

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No. .....

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Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, First Appellate District, Division One, State of California.

Petitioners pray that a writ of certiorari issue to review the judgment of the District Court of Appeal, First Appellate District, Division One, State of California, entered in the above-entitled case on April 21, 1964.

Opinions Below.

The opinion of the court below [R. 1070-1122] is reported in 226 A. C. A. 634, 38 Cal. Rptr. 199. A copy of the said opinion is attached hereto as Appendix A.

The opinion in the companion case, *Aday, et al. v. Superior Court of Alameda County,* decided by the Supreme Court of California on May 11, 1961 is reported in 55 Cal. 2d 819, 362 P. 2d 43, 13 Cal. Rptr. 415. A copy of the said opinion is attached as Appendix B.

Jurisdiction.

The judgment of the District Court of Appeal, First Appellate District, Division One, State of California (Appendix A) was dated and entered on April 21, 1964 [R. 1070]. A due and timely petition for rehearing [R. 1152-1190] was denied on May 15, 1964 [R. 1196].

A due and timely petition for hearing in the Supreme Court of California [R. 1200-1385] was denied on June 16, 1964 without opinion [R. 1390]. The court below, therefore, became the highest court of the State in which a decision could be had. *Stoner v. California*, 376 U. S. 483; *American Railway Express Co. v. Levee*, 263 U. S. 19, 20-21.

The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) since the validity of a state statute on grounds of repugnancy to the Constitution of the United States was and is drawn in question, and rights, privileges and immunities were and are specially set up and claimed under the Constitution of the United States.

Questions Presented.

1. Whether under the due process clause of the Fourteenth Amendment the petitioners can be compelled to answer an indictment based upon oral and documentary evidence more than 90% of which was concededly obtained illegally in violation of the search and seizure provisions of the state and Federal constitutions.

2. Whether petitioners under the due process clause of the Fourteenth Amendment have been denied their freedom from prosecution by a prejudiced grand jury where more than 90% of the oral and documentary

testimony introduced into evidence was concededly obtained illegally in violation of the search and seizure provisions of the state and Federal constitutions.

3. Whether the procedures used by the State to obtain the indictment against these petitioners deprives petitioners of their liberty and property without due process of law and denies petitioners the equal protection of the laws in violation of the First, Fourth and Fourteenth Amendments to the United States Constitution.

4. Whether the ruling of the court below that no evidence with respect to whether or not the books herein involved went substantially beyond contemporary community standards in the depiction of sex was required to be presented to the grand jury which returned the indictment herein, deprives these petitioners of their liberty without due process of law and denies petitioners the equal protection of the laws contrary to the First and Fourteenth Amendments to the United States Constitution.

5. Whether compulsion to stand trial herein under the indictment alleging specific overt acts, all of which were derived from illegally obtained testimony, deprives these petitioners of their liberty contrary to law and without due process of law in violation of the provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution.

6. Whether the holding of the court below that proof of *scienter* requires no more than an inference of petitioners' knowledge of the contents of the writings, solely from which knowledge of the obscenity of the writings can purportedly be inferred, deprives these petitioners of their liberty without due process of law and

denies petitioners the equal protection of the laws, contrary to the provisions of the First and Fourteenth Amendments to the United States Constitution.

7. Whether the court below erred in holding that the essential elements of the specific offense charged in the indictment were supported by legal and competent evidence, thus depriving petitioners of their liberty without due process of law and denying petitioners the equal protection of the laws, contrary to the provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution, and the pertinent provisions of sections 182(1), 311(3), 311(a), 938.1, 939.6, 939.8, 995, 1539 and 1540 of the California Penal Code are set forth in Appendix C attached hereto.

Statement of the Case.

A. At all times hereinafter mentioned, the petitioners Aday, Maxey and Lindsay, with principal place of business in the City and County of Fresno, State of California, were publishers and national distributors of books and writings.

On September 16, 1960, police officers of Fresno County and Alameda County, acting jointly and under the general direction of a Deputy District Attorney of Alameda County, entered the premises of the aforementioned petitioners located in the City and County of Fresno and, purporting to act under a search warrant, engaged in a general and exploratory search of the en-

tire premises, and seized and removed from the said premises books, writings, correspondence, ledgers, files and other private properties, papers and things belonging to petitioners. The wholesale seizure of petitioners' property consumed the entire day and was so extensive and so sweeping as to virtually strip the premises and prevent petitioners from carrying on their business.[1]

The aforesaid search and seizure began early on the morning of September 16, 1960. Shortly prior thereto, a police officer from Alameda County obtained a search warrant from a Judge of the Municipal Court of the Ffesno Judicial District. See Appendix B attached hereto, pages 31-32, for the circumstances under which the warrant was obtained.

The search warrant recited that proof by affidavit had been made by the aforesaid police officer that petitioners were engaged in a conspiracy to violate the obscenity law of California by the publication, printing and sale of two named books, "10:04 Sgt. Thorne", also known as "Sex Life of a Cop", and "Joy Killer", "among others". The search warrant also recited that certain articles and property were intended to be used as a means of committing the said offense, and authorized the seizure of the following

1. Checks, check stubs, cancelled checks, check books and bank statements.

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[1]The validity of the search and seizure was ultimately tested, as appears hereafter, in mandamus proceedings before the California Supreme Court. *Aday, et al. v. Superior Court of Alameda County*, 55 Cal. 2d 819, 362 P. 2d 43, 13 Cal. Rptr. 415 (1961). The facts here under discussion are delineated in the opinion of the Supreme Court. See Appendix B.

2. Sales records and purchase records.

3. Customers' correspondence and customers' orders.

4. Invoices.

5. Bills.

6. Vouchers.

7. Statements.

8. General ledgers, cash receivable ledgers, cash disbursement ledgers, subsidiary accounts receivable ledgers and subsidiary accounts payable ledgers.

9. Mailing lists.

10. Duplicate copies of federal and state income tax returns of Sanford E. Aday, Wallace De Ortega Maxey, Matthew J. Meehan, Nancy Brooks, Oscar Peck, Ralph Brandon, Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books, Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News Company, Inc. for the year 1959.

11. Articles of Incorporation.

12. Minutes of the board of directors.

13. Stockholder records.

14. Corporate records of Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books, Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News Company, Inc.

15. Corporate records, papers, correspondence, sales receipts and bills of lading having to do with Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books, Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News

Company, Inc., L-S Distributors, East Bay News Co., American Printing and Lithographing Co., Louis R. Swift.

16. Books and magazines, including "Sex Life of a Cop" also known as "10:04 Sgt. Thorne", and "Joy Killer", but not limited thereto.

17. Model releases, writings, stories, cartoon and advertisements and manuscripts.

18. Contracts.

19. Any and all other records and paraphernalia connected with the aforementioned businesses of Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books, Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News Company, Inc.[2]

As the California Supreme Court observed, the police officers, in executing the aforesaid search warrant "conducted a search of those premises for approximately eight hours. The officers seized thousands of copies of the two books named in the affidavit and the warrant. Sample copies of over 50 other books were also taken, as well as certain photographs and magazines. A great variety of papers and records were seized including orders, invoices, letters, checks and a checkbook, savings account books, articles of incorporation, ledgers, manuscripts, blank tax returns, and lists of dealers, news agencies and accounts". (Appendix B, p. 34).

The aforesaid property so seized on September 16, 1960 was so voluminous and extensive that it was ordered taken by the Municipal Court Judge who had

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[2]A complete copy of the search warrant is attached hereto as Appendix D.

issued the search warrant "to the Fresno jail". (Appendix B, p. 34).

While restoration proceedings were pending in the Fresno Municipal Court, the claim being that the search and seizure were illegal under the state and Federal constitutions, all of the aforesaid seized property was removed from the custody of the Fresno Municipal Court and presented to an Alameda County grand jury (Appendix B, p. 35). The Judge of the Fresno Municipal Court vainly sought a return of the property, the Deputy District Attorney informing the Municipal Court Judge that "it was impossible to present the property because it was still in the possession of the Alameda County grand jury" (Appendix B, p. 35).

On October 25, 1960, the Alameda County grand jury returned its indictment [R. 9-19]. The petitioner, along with three other named individuals, were charged with the commission of a felony, to wit, conspiracy to violate section 311, subdivision 3 of the California Penal Code by wilfully, feloniously and knowingly conspiring to wilfully and lewdly write, print, publish, sell and distribute three "obscene and indecent" writings, to wit, "Sex Life of a Cop," also known as "10:04 Sgt. Thorne," "Joy Killer" and "Decisive Years" [R. 9-11]. Eleven overt acts were alleged [R. 11-15]. Some 90% of the oral and documentary testimony presented to the Alameda County grand jury was derived from the search and seizure of the premises located in Fresno as aforestated [R. 954].

The petitioners were arraigned on December 5, 1960 [R. 21]. A motion to set aside the indictment was made by petitioners pursuant to section 995 of the California Penal Code [R. 21]. The grounds of the said

motion were that the indictment was not found as prescribed in the California Penal Code provisions affecting the conduct of investigations by the grand jury (sections 939.6 and 939.8); that each of the petitioners had been indicted without reasonable or probable cause; that the indictment was based upon no competent evidence and upon incompetent evidence, and upon imcompetent evidence illegally obtained; and that a trial under the said indictment for the aforesaid reasons would be contrary to law and the provisions of Article I, sections 8, 9, 11, 13, 19 and 21 of the California Constitution and the due process and equal protection provisions of the Fourteenth Amendment to the United States Constitution [R. 954-955].[3]

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[3]California does not preserve the secrecy of grand jury proceedings once the indictment has been returned. The reporter must transcribe his notes in all cases in which an indictment is voted. P. C. 938. The defendant is then entitled to a copy of the transcript. P. C. 938.1. The grand jury may receive none but legal evidence (P. C. 939.6), and an indictment may be returned only when all the evidence, if unexplained or uncontradicted, would, in the judgment of the grand jury, warrant a conviction by a trial jury (P. C. 939.8): If an indictment is returned without reasonable or probable cause, the court, on motion of the accused, must set it aside. P. C. 995. If the 995 motion is not made prior to trial, the defendant is precluded from afterwards objecting on the aforesaid grounds. P. C. 996. In the event the motion to set aside the indictment under P. C. 995 is denied, the accused may obtain immediate review by the appellate courts in prohibition proceedings. P. C. 999a. In the event the motion is granted, the People may immediately appeal from the order setting aside the indictment. P. C. 1238(1). These independent proceedings are intended to protect "the right of a person to be free from prosecution for crime" (*Greenberg v. Superior Court*, 19 Cal. 2d 319, 121 P. 2d 713, 715

B. While argument in the aforesaid 995 proceedings was pending [R. 21-37], the mandamus proceedings testing the legality of the search, seizure and removal of petitioners' property from Fresno to the Alameda County grand jury reached the California Supreme Court. *Aday, et al. v. Superior Court of Alameda County*, 55 Cal. 2d 819, 362 P. 2d 43, 13 Cal. Rptr. 415 (1961) (Appendix B). The Court in summary, decided as follows:

1. The search warrant issued by the Judge of the Fresno Municipal Court was a "general warrant permitting unlimited search which has long been condemned" (Appendix B, pp. 36-37);

2. The search warrant, however, stated the court, was not invalid "as a whole" (Appendix B, p. 38); the invalid portions of the warrant (virtually all the 19 categories) were "severable" from the authorization relating to the two "named books" (See, Appendix D, category "16"; Appendix B, p. 38);

3. With respect to the two named books, it was held, probable cause existed for believing that they are obscene; it was not necessary for the Judge who issued the warrant to read the books in their entirety or to receive evidence as to contemporary community standards in order to determine the issue of probable cause (Appendix B, pp. 39-40);

4. There were sufficient facts set forth in the affidavit in support of the warrant, stated the court, to justify the belief that the petitioners were involved in

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(1942)) and "the ordeal, ignominy and expense of a trial" (*Jensen v. Superior Court*, 96 Cal. App. 2d 112, 214 P. 2d 828, 832 (1950)).

the publication and distribution of the two named books; that because of petitioners' close relationship it might be assumed that petitioners were aware of the contents of the two books; and that probable cause existed to determine that persons who knew the contents of the books would realize that the books could reasonably be regarded as obscene in character (Appendix B, pp. 40-41);

5. The seizure of the thousands of copies of the two books, it was held, was valid. This did not constitute a prior restraint upon the circulation of the books, the court decided. (Appendix B, pp. 40-42);

6. The removal of the seized property from the custody of the Fresno Municipal Court to the Alameda County grand jury was unauthorized, the court held. All of the seized property, except the copies of the two named books, were ordered returned to the Fresno Municipal Court there to determine whether any of the other books or property seized were "contraband"; if contraband, then withheld from petitioners, otherwise, returned to petitioners, Appendix B, pp. 42-44.

C. The decision of the California Supreme Court was rendered as aforestated on May 11, 1961. On November 17, 1961, the motion to set aside the indictment under P. C. 995 came on for argument [R. 37].

Prior to argument, one of the defendants named in the indictment (Meehan) died [R. 33]. With respect to two other defendants (Kinney and Brantley), the indictment was set aside without objection by the pros-

ecution [R. 37, 980]. Thus, the only remaining accused under the indictment were the petitioners herein, and the defendant Swift.[4]

It was stipulated prior to argument of the 995 motion between the attorneys for the respective parties that 120 out of the 144 exhibits introduced into evidence before the Alameda County grand jury, having been illegally seized could not be considered by the court on the 995 motion.[5] It was conceded by the prosecution at the argument that more than 90% of the evidence presented to the grand jury was incompetent as illegally seized [R. 954].[6]

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[4]It has been stipulated between the respective attorneys for the respondent and the defendant Swift that the result of this petition will be equally applicable to said defendant.

[5]The exhibits presented to the grand jury and concededly illegally seized were: Nos. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 56a, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 76, 77, 78, 79, 80, 81, 82, 82a, 82b, 83, 84, 85, 85a, 85b, 85c, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 108, 109, 110, 112, 113, 114a 116, 117, 118, 119, 120, 121, 122, 123, 123a, 123b, 123c 123d, 124, 125, 127, 128, 129, 130 [See R. 45-47, 69-81].

[6]At the time of the argument of the 995 motion, the prosecution moved to strike the Second Overt Act in the indictment, the overt act referring to the book "Decisive Years" [Ex. 37] which admittedly was illegally presented to the grand jury [R. 11, 33, 71]. The court below held that the Tenth and Eleventh Overt Acts [R. 15] alleged in the indictment were not

The Judge of the Superior Court in and for the County of Alameda, the Honorable Donald K. Quayle, before whom the 995 motion was argued thereupon granted the said motion, and dismissed the indictment as to the remaining defendants [R. 37, 950].

From the order of dismissal made on November 17, 1961, the respondent prosecuted its appeal to the court below [R. 39-41].

D. On appeal by the respondent, petitioners urged in support of the Superior Court's ruling that the indictment was not supported by legal, competent evidence [R. 978-1021]; that the grand jury, in violation of the state and federal constitutions, had received oral and documentary testimony, more than 90% of which had been obtained through an undisputed illegal search and seizure [R. 1022-1025]; and that compulsion to stand trial under an indictment returned by a grand jury presented with such overwhelming and extensive evidence obtained admittedly in violation of the free speech and search and seizure provisions of the state and federal constitutions would arbitrarily deprive petitioners of their liberty without due process of law and deny them the equal protection of the laws [R. 1026-1028].

The court below held that the order made by the Superior Court setting aside the indictment was improper (Appendix A, p. 29). The court below rejected all constitutional claims made by the petitioners. Fol-

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supportive of the indictment (Appendix A, p. 27). All of the remaining overt acts alleged in the indictment were based on alleged proof derived from the illegally seized evidence presented to the grand jury [R. 982-992].

lowing the pattern set by the Supreme Court in the mandamus proceedings, the court severed from its consideration more than 90% of the record presented to the grand jury, and limited its discussion solely to whether the grand jury had probable cause for believing that petitioners had conspired to publish, print and distribute the two named books (Appendix A, p. 4).

Having thus put aside all legal consideration of the incompetent and unconstitutional testimony presented to the grand jury, the court below first held that it was not necessary for evidence of contemporary community standards to be presented to the grand jury on the issue of obscenity (Appendix A, p. 11). Secondly, the court below held that it was not required to read the two books to determine whether the grand jury had probable cause for believing the books to be obscene, since the Supreme Court in the mandamus proceedings had held that there was probable cause for believing the two books were obscene when the search warrant was issued (Appendix A, pp. 12-13; Appendix B, pp. 39-40).

With the issue of obscenity thus determined, the court below held that the grand jury had before it sufficient competent evidence to support the charge of conspiracy against all the accused (Appendix A, p. 24). With respect to the "overt acts" alleged in the indictment, the court below disregarded the fact that the proof in support of all these specific acts were undisputedly based upon illegally obtained evidence, holding merely that there was some evidence of deliveries of the two named books at times approximate to those overt acts alleged in the indictment and this was sufficient (Appendix A, pp. 26-29).

A petition for rehearing [R. 1152-1194] was denied on May 15, 1964 [R. 1196]. A petition for hearing to the California Supreme Court [R. 1198-1389] was denied on June 16, 1964 [R. 1390].

How Federal Questions Are Presented.

The federal questions sought to be reviewed, were raised at all stages of the proceedings in the courts of first instance and in the appellate courts. Promptly after the search and seizure on September 16, 1960 as aforestated petitioners instituted restoration proceedings under P. C. 1539 and 1540 claiming the invalidity of the warrant under the state and federal constitutions (Appendix B, pp. 34-35). Thereafter, in inandamus proceedings before the California Supreme Court, the said court assumed that the federal questions were properly before it and proceeded to consider and dispose of the issues. *Aday, et al. v. Superior Court of Alameda County*, 55 Cal. 2d 819, 362 P. 2d 43, 13 Cal. Rptr. 415 (1961) (Appendix B). Thus issues of free speech and press, prior restraint, illegal search and seizure, due process of law in obscenity prosecutions under the federal and state constitutions and this Court's interpretive decisions were considered and decided by the California Supreme Court (Appendix B, pp. 36-38, 39-40, 41-42, 42-44).

On the motion to set aside the indictment in the Superior Court, the grounds of the motion, among other things, were that petitioners had been indicted without reasonable or probable cause: that the indictment was based upon incompetent evidence illegally obtained; that a trial under the indictment would be contrary to the due process and equal protection provisions of the

Fourteenth Amendment to the United States Constitution [R. 954-956]. Upon respondent's appeal from the order setting aside the indictment, petitioner again urged in opposition before the court below that the indictment was not supported by legal competent evidence; that the grand jury had received overwhelming incompetent evidence obtained through illegal search and seizure; that the search and seizure was illegal in its entirety and constituted a prior restraint upon the circulation of the press, and that compulsion to stand trial under the indictment so illegally obtained as aforesaid would violate the search and seizure provisions, the due process provisions and the free speech and press provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution [R. 978-1028].

The court below rejected all the constitutional claims made by petitioners (Appendix A, pp. 6-11). On petition for rehearing, the federal claims under the First, Fourth and Fourteenth Amendments to the United States Constitution were again raised [R. 1166-1190].

On petition for hearing to the California Supreme Court, the federal questions were once more raised. The petitioners urged that since some 90% of the oral and documentary testimony was obtained illegally in violation of the search and seizure provisions of the state and federal constitutions, and introduced into evidence before the grand jury in violation of the constitutionally compelled exclusionary rule, compulsion to stand trial under the indictment would violate the free speech and press, due process and equal protection provisions of the First, Fourth and Fourteenth Amendments [R. 1298-1304]. It was also urged that petitioners had been arbitrarily and capriciously deprived of their

liberty and property, denied the equal protection of the laws and the right to exercise the freedoms of speech and press by the refusal of the court below to set aside the indictment. It was claimed that the California statutory search and seizure procedures and the penal provisions used in conjunction therewith, as construed and applied to these petitioners, were unconstitutional, null and void because arbitrarily permitting a prior restraint of the exercise of freedoms of speech and press and the abridgment and deprivation of liberty, property, the equal protection of the laws and the freedom from unreasonable searches and seizures guaranteed to the petitioners by the provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution [R. 1306-1314].

Reasons for Granting the Writ.

The court below has decided federal questions of substance not heretofore determined by this Court, and decided the federal questions in a way not in accord with applicable decisions of this Court.

1. The Fourth Amendment's right of privacy is enforceable against the States through the due process clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U. S. 25. The right is enforceable against the States by the sanction of exclusion. *Mapp v. Ohio*, 367 U. S. 643. This Court has closed "the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right" (367 U. S., at 654-655). The exclusionary rule is therefore an essential ingredient of the Fourth Amendment subsumed into the due process clause of the Fourteenth as a limitation upon State action.

The purpose of the exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U. S. 206, 217. The State is no longer permitted "to employ a procedure that is harmful to the security of the community at large because it fosters an incentive to the police to conduct unreasonable searches and seizures in violation of established principles of constitutional law". *United States v. Fay*, 333 F. 2d 12, 19 (2 Cir. 1964).

The doors are closed in the federal and state judicial systems to the receipt of illegally obtained evidence, not because of the presumptive untruthfulness or irrelevance of the material, but because of the illegality by which the material is acquired. *In re Fried*, 161 F. 2d 453, 458 (2 Cir. 1947). See, *Hinchcliff v. Clarke*, 230 F. Supp. 91, 99-110 (D. C. Ohio, 1963). "Our decision, founded on reason and truth, gives . . . to the courts, that judicial integrity so necessary in the true administration of justice." *Mapp v. Ohio*, 367 U. S., at 660.

The exclusionary rule is as broad in scope and effect as the constitutional right itself. *Cf. Counselman v. Hitchcock*, 142 U. S. 547. The suppression of evidence secured in violation of the Fourth Amendment guaranties is a sanction which the law provides in any criminal proceeding from its inception. *Weeks v. United States*, 232 U. S. 383. See, *Olmstead v. United States*, 277 U. S. 438, 476-479. "The preliminary stages of a criminal prosecution must be pursued in strict obedience to the safeguards and restrictions of the Constitution and laws of the United States." *Abel v. United States*, 362 U. S. 217, 226.

The term "criminal proceeding" within the purview of the Fourth Amendment includes the investigation of a grand jury, since such a body is merely an adjunct or appendage of the court, and the things it does represent "an incident or process in the part played by the judicial system in criminal law enforcement." *Schwimmer v. United States,* 232 F. 2d 855, 860 (8 Cir. 1956). It is therefore unlawful to present illegally obtained evidence to a grand jury. As Mr. Justice Holmes observed in *Silverthorne Lumber Co. v. United States,* 251 U. S. 385, 391-392: "Weeks v. United States . . . established that laying the [illegally seized] papers directly before the grand jury was unwarranted. . . ." Justice Holmes added: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." 251 U. S., at 392.

Since, in the case herein, the overwhelming evidence, oral and documentary, presented to the grand jury was concededly obtained in violation of the constitutional guaranties against unreasonable searches and seizures, the indictment returned against petitioners failed to meet the requirements of due process. "But it is our duty as well as the state's to see to it that throughout the procedure for bringing him [the accused] to justice he shall enjoy the protection which the Constitution guarantees." *Hill v. Texas,* 316 U. S. 400, 406.

If the underlying social policy of the Fourth Amendment is to be vindicated; if the essentials of due process are to be maintained, an accused should not be held to answer on an indictment returned by a grant jury where the evidence presented therein was obtained in flagrant

violation of the Constitution. The very essence of fairness and due process is that no one should be put to the expense, hazards, and humiliation of a trial without a constitutionally arrived at and unbiased prior determination of probable guilt. Judge Frank stated in *In re Fried*, 161 F. 2d 453, 458 (2 Cir. 1947):

> The government further argues that an indictment founded upon such illicit evidence will do the applicant no harm, since such evidence will not be admitted at the trial which follows the indictment. That is an astonishingly callous argument which ignores the obvious. For a wrongful indictment is no laughing matter; often it works a grievous, irreparable injury to the person indicted. The stigma cannot be easily erased. In the public mind, the blot on a man's escutcheon, resulting from such a public accusation of wrongdoing, is seldom wiped out by a subsequent judgment of not guilty."

Moreover, it is conceded as aforestated that some 90% of the oral and documentary evidence presented to the grand jury which returned the indictment was illegal testimony obtained in violation of the Constitution. The vast conglomeration of books, magazines, business records, private papers and materials of virtually an entire business were taken from the "Fresno jail" and unloaded into the grand jury room. There is more than a reasonable possibility that this overwhelming physical evidence, illegally seized, influenced the grand jury to return the "conspiracy" indictment herein. The grand jury had no guidance from any judicial officer; they were not cautioned nor limited in the consideration of the illegal evidence. It was not possible for the grand jury to separate the ex-

tensive illegal evidence before it from the alleged minimal competent testimony claimed by the court below to be lurking in the record. "Discrimination so subtle is a feat beyond the compass of ordinary minds." *Shepard v. United States*, 290 U. S. 66, 104.

It appears plain that the presentation of the illegally seized evidence created a bias and prejudice against these petitioners, and substantially swayed the judgment of the grand jury. There is no doubt, it is submitted, that substantial constitutional rights of the petitioners were affected by the introduction of the mass of illegally seized material. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence." *Kotteakos v. United States*, 328 U. S. 750, 765. Cf., *Stoner v. California*, 376 U. S. 483, 490, n. 8; *Fahy v. Connecticut*, 375 U. S. 85, 86; *Stromberg v. California*, 283 U. S. 359. See also, *In re Fried*, 161 F. 2d 453 (2 Cir. 1947); *United States v. Laughlin*, 226 F. Supp. 112 (D. C., D. C. 1964); *United States v. DiGrazia*, 213 F. Supp. 232 (D. C. Ill. 1963); *United States v. Constantino*, 201 F. Supp. 160 (D. C. Pa. 1962).

In addition, the criminal proceedings here involve the application of penal provisions under an obscenity law directed against books and other writings ordinarily protected by the provisions of the First Amendment. The operation and effect of the method by which the circulation of the press is sought to be restrained must be subjected "to close analysis and critical judgment". *Speiser v. Randall*, 357 U. S. 513, 520. See also, *Smith v. California*, 361 U. S. 147; *Marcus v. Search*

Warrants, 367 U. S. 717; *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58; *Jacobellis v. Ohio*, 84 S. Ct. 1676; *A Quantity of Copies of Books v. Kansas*, 84 S. Ct. 1723.

The substance and effect of the proceedings which led to the ultimate return of the indictment here was to undermine the substantial purposes, not only of the Fourth Amendment, but of the First Amendment as well. Illegitimate and unconstitutional practices should not get "their first footing" in that way, it is submitted. *Boyd v. United States*, 116 U. S. 616, 635.

2. The "severance" by the courts below of the general search warrant and the evidence received by the grand jury was, it is submitted, a "strained" application of the law to rights protected by the First and Fourth Amendments and due process provisions of the Fourteenth. The search and seizure of petitioners' property and the use of the material to obtain the indictment were clearly illegal. The retrospective attempt to legalize in minescule part the grossly unlawful conduct of the police officers and the unwarranted action of the grand jury results, it is submitted, in the erosion of constitutional freedoms by improvized legal fictions. *Stoner v. California*, 376 U. S. 483, 488.

The undisputed facts are that the police officers ransacked petitioners' premises with a general warrant, not with a severed warrant. The grand jury returned the indictment here upon the presentation of a vast array of illegally seized evidence, not solely upon evidence lawfully obtained. In areas involving constitutional rights under the due process clause of the Fourteenth Amendment, "the Court has consistently recognized its duty to

apply the applicable rules of law upon the basis of an independent review of the facts of each case." *Jacobellis v. Ohio*, 84 S. Ct. 1676, 1678.

The severance of the broad general warrant so as to validate the search and seizure of the two named books in category "16" (Appendix D) and the "thousands of copies of the two books" (Appendix B, p. 34) controverts the search and seizure, due process and free speech and press provisions of the Constitution. See, *Mapp v. Ohio*, 367 U. S. 643; *Marcus v. Search Warrants*, 367 U. S. 717, 738, 739; *Elkins v. United States*, 364 U. S. 206.

"Lord Camden in *Entick v. Carrington* recognized that there was no justification for the abuse of the search and seizure power in suppressing seditious libel, even if the view were accepted that 'men ought not to be allowed to have such evil instruments in their keeping'. 19 How. St. Tr., at 1072. He said, 'If [libels may be seized], *I am afraid, that all the inconvenience of a general seizure will follow upon a right allowed to seize a part. The search in such cases will be general, and every house will fall under the power of a secretary of state to be rummaged before proper conviction.*'." *Marcus v. Search Warrants*, 367 U. S. 717, 731, n.24 (emphasis supplied). The practice of severing a general search warrant, if permissible at all in cases involving liquor or gambling violations, should not be assimilated to search and seizure procedures adopted in obscenity prosecutions where constitutional protection for free expression is at stake. *Smith v. California*, 361 U. S. 147, 152-153; *Marcus v. Search Warrants*, 367 U. S. 717, 730-731; *A Quantity of Copies of Books v. Kansas*, 84 S. Ct. 1723, 1726-1727.

It is important to emphasize that the two named books, and the thousands of copies thereof, which were brought to the grand jury in 1960, and upon which the validity of the indictment was held to rest by the courts below, have never been adjudicated obscene. The seizure of thousands of copies of the named books was made without any prior adversary determination of their obscenity.

Nevertheless, despite the illegality of the search and seizure and the invalid prior restraint upon the circulation of the material, the two books were used by the courts below to uphold findings of probable cause in the issuance of the warrant and the return of the indictment against these petitioners.

It is submitted, under the circumstances here presented, that the procedures leading to the return of the indictment were constitutionally deficient. The due process violations under the Fourteenth Amendment infected the proceedings below, requiring the indictment to be set aside in order to vindicate petitioners' constitutional rights. *A Quantity of Copies of Books v. Kansas*, 84 S. Ct. 1723; *Marcus v. Search Warrants*, 367 U. S. 717.

3. Compulsion to stand trial under an empty and illegal indictment such as is presented herein is, it is submitted, contrary to the equal protection and due process provisions of the Fourteenth Amendment.

There was no evidence presented to the grand jury that the two books, "10:04 Sgt. Thorne, also known as Sex Life of a Cop" and "Joy Killer"[7] were probably

[7]A copy of each of the two named books is being lodged with the Court simultaneously with the filing of this petition.

obscene because no evidence was presented to the grand jury that the books exceeded contemporary community standards. Moreover, the court below declined to read the books relying upon the finding of "probable cause" in support of the severed search warrant by the California Supreme Court whose determination rested upon a non-adversary proceeding with the issue of contemporary community standards specifically excluded from consideration (Appendix B, p. 40). See, *Jacobellis v. Ohio*, 84 S. Ct. 1676; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478.

Every one of the specific overt acts alleged in the indictment upon which the court below relied were derived from business records, invoices and documents illegally seized. The evidence upon which the grand jury relied to accuse these petitioners of overt acts in furtherance of the alleged conspiracy was therefore clearly illegal.

There was moreover no proof presented to the grand jury that the petitioners knew that the two named books were probably obscene. The court below held that inferred knowledge by an accused of the contents of a book is equivalent to knowledge of obscenity. Clearly, proof solely that an accused knew the contents of a writing is not rational evidence that the accused knew the material was obscene, to wit, that the writing exceeded contemporary community standards, appealed to a prurient interest and was of no social importance. See, *Smith v. California*, 361 U. S. 147; *Manual Enterprises, Inc. v. Day*, 370 U. S. 478.

There was, in consequence of all the aforesaid, a complete lack of proof of the essential elements of the offense charged in the indictment. Compulsion to

stand trial under such an illegal and unsupported indictment deprives the guaranties contained in the Constitution of much of its protective value to private citizens. *Speiser v. Randall,* 357 U. S. 513; *Smith v. California,* 361 U. S. 147: *Marcus v. Search Warrants,* 367 U. S. 717; *Jacobellis v. Ohio,* 84 S. Ct. 1676; *Thompson v. City of Louisville,* 362 U. S. 199; *Garner v. Louisiana,* 368 U. S. 157.

4. The judgment of the court below is final. It is subject to no further review in any other state tribunal, since a petition for hearing was denied by the Supreme Court. As aforestated, moreover, the proceedings herein are "independent, adversary and both adapted and directed to the enforcement of a most important personal right". *New York, ex rel. Bryant v. Zimmerman,* 278 U. S. 63, 71.

The denial of a 995 motion to set aside an indictment requires the accused to seek a prompt review of the order by a petition for a writ of prohibition. P. C. 999a. It has been held that in proceedings in prohibition, habeas corpus and mandamus, it is sufficient for purposes of review by this Court, if the judgment of the highest court of the State finally determines the right of the petitioner to the writ sought. These proceedings are considered as independent, even when in fact incidental to some other proceeding. *Madruga v. Superior Court,* 346 U. S. 556, 557, n. 1; *Pacific Coast Dairy v. Department of Agriculture,* 318 U. S. 285.

In the case herein, the 995 motion was initially granted by the Superior Court and the respondent promptly sought review of the order by appeal. P. C. 1238(1). The effect of the order of the court below

is to leave petitioners in the same position as if a petition for a writ of prohibition had been initially denied, and the denial upheld by the highest court of the State. For all practical purposes, the proceedings are independent of, and unaffected by, any other litigation.

Moreover, as a practical matter the effect of the order of the court below will be irreparable by any subsequent appeal. The claim here is that petitioners should not be compelled to answer an accusation obtained in violation of provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution. The damage of the constitutional errors unreviewed by this Court is definitive and complete. Moreover, the constitutional issues here, of great general and public importance, are not enmeshed in the factual or legal issues of any other proceeding. Deprivation of substantial rights of the petitioners and the community have taken place in violation of the governing policies embodied in the constitutional provisions, and review is required of the issues here which have been definitely disposed of as matters distinct from the litigation in general. *Mercantile National Bank at Dallas v. Langdeau*, 371 U. S. 555, 557-558; *Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry*, 371 U. S. 542, 546-551.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

STANLEY FLEISHMAN,
Counsel for Petitioners.

Of Counsel:
SAM ROSENWEIN.

APPENDIX A.

Opinion and Judgment of the District Court of Appeal.

226 A.C.A. 634, 38 Cal.Rptr. 199.

[Crim. No. 4101. First Appellate District. Division One. Filed April 21, 1964. Lawrence R. Elkington, Clerk.]

People of the State of California, Plaintiff and Appellant vs. Sanford E. Aday, et al., Defendants and Respondents.

The People appeal from an order setting aside an indictment against defendants[1] under section 995 of the Penal Code. The sole question presented is whether the trial court erred in dismissing the indictment on the ground that defendants were indicted without reasonable or probable cause. We are thus called upon to determine whether the evidence received by the grand jury was sufficient to establish reasonable cause to warrant the return of the indictment. Before doing so, however, it is necessary that we review the procedural background of the case insofar as it is relevant to our determination of the question before us.

An indictment was returned by the grand jury charging these defendants with a felony (violation of § 182,

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[1]Defendants are Sanford E. Aday, Wallace deOrtega Maxey, Jack A. Lindsay and Louis Swift. Another named defendant, Matthew J. Meehan, died subsequent to the return of the indictment and the action was thereafter dismissed as to him. When individually referred to hereinafter each will be designated by surname.

subd. 1, of the Pen. Code),[2] to wit, conspiracy to violate subdivision 3 of section 311 of the Penal Code[3] in that said defendants "did wilfully, feloniously and knowingly conspire, combine, confederate and agree together and with each other and with other persons wilfully and lewdly to write, compose, stereotype, print, publish, sell, distribute, keep for sale and exhibit obscene and indecent writings, papers and books, to wit, 'Sex Life of a Cop,' also known as '10:04 Sgt. Thorne,' 'Joy Killer' and 'Decisive Years.'" The indictment charged 11 overt acts.[4] In the proceedings before the grand jury a total of 143 exhibits were presented in evidence. In addition to two copies of "Sex Life of a Cop," copies of "Decisive Years" and "Joy Killer," including a manuscript and negatives of the latter, the exhibits consisted of a variety of papers and records, certain photographs, and over 50 copies of other books.

A motion was made by defendants to set aside the indictment pursuant to Penal Code section 995. While this motion was pending, our State Supreme Court was called upon to determine a mandamus proceeding

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[2]§ 182 of the Pen. Code provides in effect that, if two or more persons conspire to commit any misdemeanor other than one constituting a crime against the person of specified government officials they are punishable by imprisonment in the county jail or state prison or by a fine.

[3]At all times applicable to this case § 311 of the Pen. Code provided, in pertinent part, as follows: "Every person who wilfully and lewdly . . . 3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book . . . is guilty of a misdemeanor."

[4]The second overt act was thereafter stricken from the indictment pursuant to motion.

brought to compel the court below to return to petitioners property taken under an assertedly invalid search warrant. A writ was granted directing the superior court to return all seized property excepting two books entitled "Sex Life of a Cop" and "Joy Killer," which had been specifically named in the affidavit for the warrant and in the warrant itself. (See Aday v. Superior Court, 55 Cal. 2d 789.) Thereafter, and upon written stipulation of the parties, filed in the proceedings, it was stipulated, in view of the decision in Aday v. Superior Court, supra, that 120 of the aforesaid 143 exhibits be "deemed withdrawn from the evidence considered by the Court on defendants' motion to set aside the indictment pursuant to § 995 of the Penal Code, without prejudice to defendants' rights to claim the illegality and incompetency of any of the remaining exhibits presented to the Grand Jury. . . ."[5] The trial court subsequently made its order setting aside the indictment, and it is from this order that the People appeal.

As a result of the aforementioned stipulation, the evidence considered by the trial judge in determining whether the evidence received by the grand jury was sufficient to justify a suspicion of a conspiracy consisted of the remaining 23 exhibits[6] and the testimony

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[5]Among the exhibits withdrawn was the copy of the book "Decisive Years."

[6]These exhibits consist of the following: documents of the City of Oakland License Department relative to the licensing of the East Bay News Company and Swift's relationship thereto; State of California Division of Corporation files appertaining to Vega Books, Inc.; Fabian Books, Ltd.; Mid-Tower Publishing Corporation; West Coast News Co., Inc.; Gorin, Inc., re-

presented. Our function is like that of the trial court, i.e., to determine whether the members of the grand jury, acting as men of ordinary caution or prudence, could be led to believe and conscientiously entertain a reasonable suspicion that defendants were guilty of the offense charged. (People v. Nagle, 25 Cal. 2d 216, 222; Bompensiero v. Superior Court, 44 Cal.2d 178, 183-184; Lorenson v. Superior Court, 35 Cal.2d 49, 56-58.) While ordinarily in making this determination we would review all of the evidence presented to the grand jury, we shall likewise, in view of the stipulation, consider, in conjunction with the oral testimony, only the 23 exhibits aforesaid.

In view of the aforesaid stipulation, our inquiry, as was that of the trial judge, is directed solely to the books "Sex Life of a Cop" and "Joy Killer." Accordingly, we must determine whether there was probable cause for believing that these books are obscene, that a general conspiracy existed to violate the provisions of section 311, subdivision 3, of the Penal Code, and that defendants were a part of that conspiracy. In making

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spectively; paper backed books entitled "10:04 Sgt. Thorne" and "Joy Killer," respectively; photographs of Aday and Maxey, respectively; 5 photographs of two buildings in Fresno; a paper on which Maxey wrote his name and address at the request of the district attorney; 72 copies of bills of lading on shipments from West Coast News Company; negatives of "Joy Killer" on yellow mask; book entitled "Sex Life of a Cop"; and 6 sales tickets East Bay News Company to Town and Country, San Leandro. It is clear from the record that exhibits 1-10, inclusive, 111, 114, 115, 131 and 132 were not part of the property seized under the aforesaid search warrant. The origin of exhibits 74, 75, 103, 104, 105, 106, 107 and 126 is not disclosed by the record before us.

this determination, our concern is to ascertain if there is any competent evidence to support the indictment, guided by the fundamental principle announced in *Bompensiero* that an indictment will not be set aside if there is some rational ground for assuming the possibility that the offense charged has been committed and the accused is guilty of it. (Callan v. Superior Court, 204 Cal.App.2d 652, 662.) It is not our function to inquire into the sufficiency of the evidence to sustain a conviction (Lorenson v. Superior Court, supra, p. 55; People v. Oppenheimer, 209 Cal.App.2d 413, 421); nor are we to substitute our judgment as to the weight of the evidence for that of the grand jury. (Lorenson v. Superior Court, supra, p. 55.) It is convenient to point out here that an indictment may not be set aside merely because some incompetent evidence was received by the grand jury if there is otherwise substantial competent evidence to support the indictment. (Callan v. Superior Court, supra, p. 662; Mc Farland v. Superior Court, 88 Cal.App.2d 153, 158; Stern v. Superior Court, 78 Cal.App.2d 9, 17-18.) Accordingly, where sufficient competent evidence is introduced to support the indictment, it not rendered void by the reception of some incompetent evidence. (Stern v. Superior Court, supra, p. 18; People v. Freudenberg, 121 Cal.App.2d 564, 573.) However, where there is absolutely no competent evidence before the grand jury of the commission of the crime charged, or where there is a total absence of evidence supporting a necessary element of the crime charged, the indictment will be held invalid. (People v. Byars, 188 Cal.App.2d 794, 796; People v. Olf, 195 Cal.App.2d 97, 102; People v. Bartlett, 199 Cal.App.2d 173, 179; Callan v. Superior Court,

supra, p. 662; see Greenberg v. Superior Court, 19 Cal.2d 319, 322.)

Preliminary to any discussion of probable cause we must consider certain constitutional questions posed by defendants. Swift urges that section 311 is unconstitutional. He cites no case in support of his claim excepting Smith v. California, 361 U.S. 147. There is nothing in *Smith* which even remotely suggests that section 311 is unconstitutional. The plain holding of *Smith* is that a Los Angeles municipal ordinance which, without requiring scienter, makes it a criminal offense for any person to have in his possession an obscene or indecent writing or book in a place of business where books are sold or kept for sale is violative of the Federal Constitution. The majority opinion takes cognizance of section 311, and points out that the ordinance in question sought to eliminate scienter as permissible supplementary legislation to section 311, "a state-wide obscenity statute which requires scienter." (P. 149, fn. 3.) It suffices to say, moreover, that section 311, as it read at the time of the offense charged in the instant case, was held to be constitutional in Roth v. United States, 354 U.S. 476.

The claim of unconstitutionality on the part of Aday, Maxey and Lindsay is based upon the assertion that the grand jury received incompetent evidence obtained through illegal search and seizure. This contention does not find support in the record. As hereinabove pointed out, 15 of the 23 exhibits presented to the grand jury were clearly not the result of any search or seizure. Exhibits 1 to 8, inclusive, were official documents produced by witnesses who were called to testify before the grand jury. Exhibits 9 and 10 consisted of the

two books in question. As testified by Officer Lippold, they were purchased by him at two liquor stores in Hayward. They were identified by him at the grand jury hearing as the books so purchased and were admitted in evidence before that body. *These* books were then read to the grand jury by two deputy district attorneys. Exhibit 111 consists of a paper written by Maxey *at* the hearing. Exhibits 114, 115 and 132 consist of bills of lading and invoices produced by witnesses who testified at the subject grand jury proceedings. Exhibit 131 is a copy of "Sex Life of a Cop," which a witness, Theodore Vlahos, testified was sold by him at his liquor store in San Leandro, Alameda County. We are thus left with 8 exhibits, the origin of which does not appear in the record. These consist of photographs of Aday and Maxey (exs. 74 and 75); photographs of two buildings in Fresno (exs. 103, 104, 105, 106, and 107); and negatives of "Section 1, Form 1" of the book "Joy Killer" on a yellow mask (ex. 126). It is not urged by any of the defendants that these 8 exhibits were among those held by Aday v. Superior Court, supra, 55 Cal.2d 789, to have been illegally seized, nor do they so point out in their briefs. It is apparent, moreover, that with the exception of the two subject books (which the *Aday v. Superior Court* case held had been legally seized) the purport of the aforesaid stipulation was to exclude all property which, under the holding in *Aday v. Superior Court*, were found to have been illegally seized.

We are satisfied from the record that the three books marked exhibits 9, 10, and 131 were not the products of the search and seizure considered by *Aday v. Superior Court*. At best, the negatives of "Joy Killer" (ex. 126) may have been the fruits of the search

which came under the scrutiny of the *Aday v. Superior Court* case. This exhibit, although introduced in evidence, was not read to the jury; the books read being exhibits 9 and 10. The latter were not tainted with the mark of illegal search and seizure. Accordingly, assuming *arguendo* that exhibit 126 was not competent as evidence, defendants were not prejudiced by its introduction because it was merely cumulative of exhibit 10 which constituted competent evidence already in the record. More significant, however, is the holding in *Aday v. Superior Court* that the search warrant there under examination *was* valid as to the two subject books. This holding was in no way overruled, as suggested by defendants, by the subsequently decided cases of Mapp v. Ohio (1961) 367 U.S. 643; Marcus v. Search Warrant (1961) 367 U.S. 717; and Aday v. Municipal Court (1962) 210 Cal.App.2d 229.[7] The essence of the holding in *Mapp* is that the question of unlawful search and seizure is a Federal constitutional question not controllable by any state rule of evidence. The *Marcus* decision holds, essentially, that under the facts there presented all the seized property, whether contraband or not, should be returned to the owners because the general exploratory search in which property had been found was not supported or supportable by a valid search warrant, and because the immediate and prolonged sequestration of the seized articles without the sanction of a court hearing to determine whether they were obscene (i.e., whether they were contraband), constituted a denial of procedural due process.

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[7]A petition for a hearing by the Supreme Court was denied.

The *Aday v. Municipal Court* case involved a mandamus proceeding seeking the return of items of property claimed to have been taken after an unlawful search and seizure in Burbank, California. Applying the principles announced in Aday v. Superior Court, supra, 55 Cal.2d 789, the District Court of Appeal held that the search warrant under consideration was invalid except as to the two books named in it, i.e., the subject books—"Joy Killer" and "Sex Life of a Cop." The reviewing court observed, in its opinion, that the holding in *Aday v. Superior Court,* to the effect that the invalid portions of the warrant are severable from the authorization relating to the named books, was not in conflict with the *Marcus* case. The court noted that the search warrants in *Marcus* were general and exploratory and did not particularly describe any publications, while the warrants in *Aday v. Superior Court* and those in the case there at bar did. Although the appellate court granted a peremptory writ ordering the return of all the property seized, including the two subject books which it held had been validly seized, it did so with respect to said books on the ground that, under the facts of the case, their status had not been established in a manner required by due process, i.e., the seizure was not followed expeditiously with a court hearing to determine the question of obscenity, a court hearing having been requested by the owners of the books.[8] "We are satisfied," said the court, "that the

[8]The writ was granted on the following grounds: that aside from the two books in question the search warrant under examination afforded no justification for search for other publications or seizure thereof; that the refusal of the magistrate to entertain evidence of whether particular items are obscene was an active

rationale of the *Marcus* opinion requires that a determination of the question of obscenity be made after hearing of actual evidence (if requested) and before the trial of the case; that the seized property cannot be used in evidence against the owner unless it has been previously established in such factual hearing to be contraband." (P. 249.) The court did, moreover, take special note of the holding in *Aday v. Superior Court* that where property claimed to be obscene is seized, a determination of the issue of obscenity can be immediately obtained in adversary proceedings by controverting the warrant under sections 1539 and 1540 of the Penal Code; that in the event the owner is unsuccessful in that proceeding "a final determination as to obscenity will be had in the criminal action which will ordinarily follow within a reasonable time, or other remedies such as mandamus will be available to secure return of the property"; and that "[t]hese various remedies satisfy the requirements of due process. . . ." (Pp. 799-800.)

It is significant to note that *Marcus* and both of the *Aday* decisions were dealing with cases in which the alleged obscene property had been seized pursuant to a search warrant. These decisions are all in harmony insofar as they declare that the seizure of allegedly obscene publications is not invalid if made on probable cause provided the owner of the book has adequate remedies by which to litigate the issue of obscenity. If there is any inconsistency between *Marcus* and *Aday*

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denial of due process; and that refusal or failure to return to petitioners, as ordered, items found not to be obscene, which refusal and failure extended for about a year, was also a denial of due process.

v. Superior Court it lies, as suggested by *Aday v. Municipal Court,* in the language of our State Supreme Court which appears to indicate that the seized property may be withheld without establishing through a court hearing *at an early date* the fact of contraband publication. It is to be noted, however, that in the case at bench the books in question were not obtained as the result of a seizure but were purchased from a retail outlet by the People's representative. Under these circumstances, we are satified that the safeguards which due process demands do not require that the issue of obscenity be determined prior to the trial of the criminal action. Moreover, the record is barren of any suggestion that defendants have requested that a determination of the question of obscenity be made upon a factual hearing before the trial of the case.

"The standard for judging obscenity adequate to withstand the charge of constitutional infirmity is whether to the average person, applying contemporary community standards, the dominant theme of the material, taken as a whole, appeals to prurient interest." (In re Harris, 56 Cal.2d 879, 880; Roth v. United States, supra, p. 489; Aday v. Superior Court, supra, p. 798.) Accordingly, it is a denial of due process for a trial court not to allow a defendant to prove contemporary community standards at his trial. (In re Harris, supra, p. 880.) It is not necessary, however, that evidence of contemporary community standards be received on the issue of probable cause. (See Aday v. Superior Court, supra, pp. 798-799.) A determination of obscenity may therefore be made by a grand jury, insofar as the issue of probable cause is concerned, without the necessity of receiving evidence as to such standards.

Our first concern, therfore, is whether there was probable cause for the grand jury to believe that the subject books are obscene. It should be emphasized that the grand jury was not concerned with the final determination of the character of the books or of the guilt of the accused, but only with the issue of probable cause. The phrase "probable cause" has an established meaning in our law. It means "such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused." (People v. Nagle, supra, 25 Cal.2d 216, 222; Rogers v. Superior Court, 46 Cal.2d 3, 7-8; Perry v. Superior Court, 57 Cal.2d 276, 283.) The subject books were read to the grand jury in their entirety but no evidence of contemporary community standards was presented. However, as we have hereinabove pointed out, such evidence is not required on the issue of probable cause. The grand jury concluded that there was probable cause for believing that the books were obscene. Ordinarily, our function would require us to read the two books in order to determine whether the grand jurors, acting as men of ordinary caution or prudence, could conscientiously entertain a strong suspicion that to an average person, applying contemporary community standards, the dominant theme of each of the books, taken as a whole, appeals to prurient interest. We are not required to do so in the instant case, however, because insofar as probable cause is concerned, the books in question have been held to be obscene by *Aday v. Superior Court*. On page 798 of its opinion our State Supreme Court says: "An examination of the two books convinces us there was probable cause for believing that they are obscene. Their text is such that an

average person, applying contemporary community standards, could reasonably believe that their dominant theme appeals to a lascivious, shameful, and morbid interest in sex and that they are totally lacking in redeeming value, literary or otherwise." We are not unmindful that the court was there concerned with probable cause for the issuance of a search warrant, while in the case at bench we are confronted with probable cause in support of an indictment. There is no distinction, however, in the meaning of probable cause as applied to either situation. It is well established that the phrase "probable cause" is equivalent in meaning to "sufficient cause" and "reasonable cause." (Perry v. Superior Court, supra, p. 283; Rogers v. Superior Court, supra, pp. 7-8.) Accordingly, the definition of probable cause hereinabove stated has been consistently applied with equal force to the issuance of warrants[9] (see Dunn v. Municipal Court, 220 A.C.A. 871, 882-883; People v. Perez, 189 Cal.App.2d 526, 532), to arrests without a warrant (see People v. Fischer, 49 Cal. 2d 442, 446; People v. Brite, 9 Cal.2d 666, 687; People v. Cedeno, 218 A.C.A. 229, 236), to commitment by a magistrate[10] (see Perry v. Superior Court, supra, p. 283; Rogers v. Superior Court, supra, pp. 7-8; People

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[9]Art. I, § 19, of the California Constitution provides that no warrant shall issue "but on probable cause"; Pen. Code § 813 provides that a warrant of arrest may issue when there is "reasonable ground"; and Pen. Code § 1525 provides that a search warrant cannot be issued "but upon probable cause. . . ."

[10]Pen. Code §§ 871 and 872 use the following language: "Sufficient cause to believe the defendant guilty"; and Pen. Code § 995 provides that an information must be set aside if the defendant has been committed without "reasonable or probable cause."

v. Nagle, supra, p. 222), and to indictments by a grand jury (Bompensiero v. Superior Court, supra, 44 Cal. 2d 178, 183-184; Lorenson v. Superior Court, supra, 35 Cal.2d 49, 56-57; People v. Rissman, 143 Cal. App. 2d 488, 494).[11]

Adverting to the question whether the evidence before the grand jury shows probable cause to believe a criminal conspiracy existed and that defendants were a part of it, we reiterate certain fundamental principles pertaining to the crime of conspiracy. A criminal conspiracy may be established by showing that there was an agreement between two or more persons to commit a crime and that an act was done in California to effect the object of the agreement. (Pen. Code, §§ 182, 184; People v. Buffum, 40 Cal.2d 709, 715; People v. Massey, 151 Cal.App.2d 623, 651.) "The essence of the crime of conspiracy is the 'evil' or 'corrupt' agreement to do an unlawful act. It is the evil intent that makes a combination criminally indictable." (People v. Marsh, 58 Cal.2d 732, 743.) Accordingly, conspiracy is a "specific intent" crime requiring that the accused have the specific intent to do an unlawful act or to do a lawful act by unlawful means. (People v. Marsh, supra, pp. 743-744; People v. Bowman, 156 Cal.App.2d 784, 797-798.) Mere association does not establish a conspiracy, but there must be evidence of some participation or interest in the commission of the offense. (Dong Haw v. Superior Court, 81 Cal.App.2d 153, 158; People v. Long, 7 Cal. App. 27, 33; People v. Griffin, 98 Cal.App.2d 1, 39; People v. Massey, supra, pp. 651-652.)

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[11]Pen. Code § 995 provides that an indictment must be set aside if the defendant has been indicted without "reasonable or probable cause."

It is not necessary that the overt act be criminal. (People v. Gordon, 71 Cal.App.2d 606, 628; People v. Olf, supra, 195 Cal.App.2d 97, 107; People v. Sica, 112 Cal.App.2d 574, 581.) It may be committed by one of the conspirators, and when so committed all members of the conspiracy are bound by such act. (People v. Buffum, supra, p. 725; People v. Sica, supra, p. 581.) "It is equally well settled that after a conspiracy to commit an unlawful act is established, every act of each member of the conspiracy in furtherance of their original plan is, in contemplation of law the act of all of them." (People v. Massey, supra, p. 653; People v. McManis, 122 Cal.App.2d 891, 900.) It is not necessary that a defendant be shown to have been a member of a conspiracy from its inception, but one who joins a conspiracy after it is formed, and actively participates in it, thereby adopts the previous acts and declarations of his fellow conspirators. (People v. Griffin, supra, p. 44; Anderson v. Superior Court, 78 Cal.App.2d 22, 24.) Nor is it necessary, moreover, that each conspirator see the others or know who all the members of the conspiracy are. (People v. Buffum, supra, p. 725.)

The existence of the agreement may be shown by circumstantial as well as by direct evidence. (People v. Massey, supra, pp. 651-652; People v. Olf, supra, p. 107; People v. Bucchierre, 57 Cal.App.2d 153, 163.) In *Bompensiero* it is stated that "The rule governing the sufficiency of the evidence to justify a supicion of a conspiracy has been summarized as follows: 'Direct proof of a formal understanding between parties to the conspiracy is not required as the basis of an indictment or information. "[I]t was not necessary for the State to prove that the parties actually came together, mutually

discussed their common design, and after reaching a formal agreement set out upon their previously agreed course of conduct. The extent of the assent of minds which are involved in a conspiracy may be, and from the secrecy of the crime usually must be, inferred by the jury from the proofs of the facts and circumstances which, when taken together, apparently indicate that they are parts to the same complete whole.'' (Lorenson v. Superior Court, supra, 35 Cal.2d 57-58.)" (P. 184.)

In the light of the applicable legal principles hereinbefore discussed, we now turn to a consideration of the competent testimony presented to the grand jury.

Officer Vernon Lippold of the Hayward Police Department testified that on June 2, 1960 he purchased a book entitled "10:04 Sgt. Thorne" from Fred Bender at the Southgate Liquor Store in Hayward and that on the same day he purchased a pocket book entitled "Joy Killer" from Clarence Bradberry at Willis Liquor Store in Hayward.[12] Bender, the owner of Southgate Liquor Store, and Bradberry, an employee of the Willis Liquor Store, were called as witnesses. Bender testifed that his store had been a retail outlet for "Fabian, Saber, and Vega" books which he received from the East Bay News Company.[13] He identified exhibit 9 as the book which he sold "to the officer. . . ." Bradberry stated that as a clerk for Willis Liquor Store he had had occasion to sell "Fabian, Saber and Vega" books; that these included the books identified as exhibits 9 and 10; and that his store received certain

[12]As hereinabove pointed out these exhibits were introduced in evidence and marked exhibits 9 and 10, respectively.

[13]Hereinafter referred to as East Bay.

books from East Bay, but that he did not know whether this company distributed the two subject books. Theodore Vlahos, owner of the Town and Country Liquors, testified that he sold the book "Sex Life of a Cop" at his establishment from January 1960 until June or July of the same year; he identified exhibit 131 as the particular copy which he recalled selling; that in May of 1960 he telephoned a company known as Fabian Publishing Company in Fresno; and that to the best of his recollection he received a delivery of "those two particular titles" about which he testified a week or 10 days after this telephone call. Vlahos identified a copy of an invoice (ex. 132) as a part of his business records, and testified that according to this invoice he received 60 assorted pocket books, 80 "Vega" and 109 assorted "Fabian" books on May 26, 1960. Another witness, Ernst Bellak, owner of a concession in Swan's Market in Oakland, where magazines, books and supplies are sold, testified that "within the past year"[14] he sold "Vega" books and that he had sold the book "Joy Killer."

Sebastian Abel, a warehouseman employed by East Bay, testified that it was the exclusive distributor for "Vega, Saber and Fabian" books in Alameda County; that East Bay is owned by Louis Swift; that Swift is also the owner of L S Distributing Company in San Francisco; that he packaged and prepared for shipment books distributed by East Bay, including the books identified as exhibits 9 and 10; that "Southgate Liquors" and "Willis Liquors" were customers of East Bay, the former ceasing to be such shortly after January 1960; that he had never had any conversation with

[14]The witness testified on October 24, 1960.

Swift regarding the type of books he distributed; that the subject books were delivered to East Bay by truck and that some came by mail; and that the subject books came from West Coast News Company located on Belmont Avenue in Fresno. Frank E. Danis, a driver for East Bay, testified that he had delivered "Fabian, Saber and Vega" books to several retail outlets in Alameda County, including Adler's Smoke Shop, Bellak's and the Southgate and Willis Liquor Stores and that these included copies of "Joy Killer" and "Sex Life of a Cop." He also stated that he had never had a conversation with Swift about the subject books, and that he had never been told by Swift that certain books were to be "pushed." A witness from the City of Oakland License Department identified exhibits 1, 2 and 3 as official business records which indicated that a license as a wholesale magazine and newspaper distributor was issued to a "Louis Swift."

Thomas J. Lowe, a supervising investigator of the Division of Corporations of the State of California, testified from official records with respect to four corporations known as Vega Books, Inc., Fabian Books, Ltd., Mid-Tower Publishing Corporation, and West Coast News Co., Inc.[15] He stated that the officers of Vega are Meehan, president, Nancy Brooks, vice-president, and Aday, secretary-treasurer; that those of Fabian and Mid-Tower are Maxey, president, Meehan, vice-president, and Aday, secretary-treasurer; and those of West Coast are Meehan, president, Maxey, vice-president and Aday, secretary-treasurer. The primary busi-

[15]Hereinafter referred to as Vega, Fabian, Mid-Tower and West Coast, respectively.

ness purpose of Vega and Fabian, as read into the record by Lowe from the respective article of incorporation, was " 'to engage in the printing, binding, publishing, circulation and distribution of books, pamphlets, circulars, magazines and literature of every kind,' " and that of West Coast, " 'the distribution, buying, selling and dealing in books, pamphlets, circulars, posters, newspapers, magazines and literature of every kind.' "[16] Lowe testified further that Fabian's place of business is 2919 Belmont Avenue, Fresno, and that of Vega, 2968 Olive Avenue East, Fresno. He also stated that 1,000 shares of Vega, all of the stock of Mid-Tower, and 500 shares of West Coast were authorized to be issued to Aday.

Lester Kincaid, a public accountant retained by Fabian, Vega, Mid-Tower and West Coast, testified with reference to certain of the exhibits which were subsequently withdrawn from consideration pursuant to the aforesaid stipulation. Aside from his testimony directly related to such exhibits he testified as follows: that Fabian also produced books under the name of Saber; that the book "10:04 Sgt. Thorne," also known as "Sex Life of a Cop," bearing the code number "SA-11," the "SA" standing for Saber, was a "Saber Book"; that "Saber books" are produced by Fabian; that the book "Joy Killer" bears the code number "V-4," the "V" standing for "Vega";[17] that Aday has an office at 2919 East Belmont Avenue, Fresno; that Lindsay "is

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[16]No testimony was presented as to the primary business purpose of Mid-Tower.

[17]The witness was shown exhibits 9 and 10 and the designation "SA-11" and "V-4" on the respective edges thereof.

there"; that he saw Maxey, Meehan and Aday on the premises of Mid-Tower, West Coast and Fabian; that he was retained by Aday; that Aday wrote some of the Fabian, Vega and Saber books, and that Maxey wrote one of such books; that Lindsay and Maxey work "for these corporations"; that Vega is located at 2968 East Olive Avenue, Fresno; that he knew that the book "10:04 Sgt. Thorne" was shipped to Alameda County; that he was employed by the corporations which published this book; that he knew its contents; and that he spent 50 to 60 percent of his time on these accounts. Another accountant, George K. Marsh, gave the following testimony: that he was retained by Aday; that he kept all of the records of Vega and the payroll records for Mid-Tower, Fabian and West Coast; that Vega was located at 2968 East Olive Avenue, Fresno;[18] that he also kept the books for Sunset Enterprises which is "Aday's personal books"; that Aday draws a salary as an officer of Vega; that after a book has been purchased by Vega it is put into print; that American Printing and Lithographing Company[19] has done some of the printing; that after a book is printed it is sent in its unfinished state to Mid-Tower at 2919 East Belmont Avenue, Fresno, for binding; that Mid-Tower does all of the binding; that the printing company bills Vega for the printing and Mid-Tower bills Vega for the books bound; that the amount charged by Mid-Tower is in turn charged to West Coast; that Aday or Lindsay would call and tell him to issue a check for advance royalties to authors of books drawn on Sun-

[18]The witness identified pictures of the building at this address (exs. 106 and 107).

[19]Hereinafter referred to as American.

set Enterprises; that he usually went to 2919 East Belmont Avenue[20] on Monday of each week to make up the payroll for the three corporations; and that Maxey and Lindsay were there on most occasions.

Maxey took the stand, and, aside from the statement that he was employed by Mid-Tower as a general accountant or clerk who supervised the office work at 2919 East Belmont Avenue, Fresno, refused to answer on constitutional grounds. Nancy Brooks testified that she was employed by Aday from October 1959 until March 1960; that she received her checks from Sunset Enterprises and Fabian; that she was hired as a secretary; that Lindsay was an associate editor at 2919 East Belmont Avenue; and that he directed her with respect to the titles and capitalization of the books.

Manuel Gorin, an owner of American, located in San Francisco, testified that his company did printing for Mid-Tower and Vega; that it printed approximately 350,000 books a month for the "Aday operation at Mid-Tower. . . ." James E. Lennon, office manager of Fortier Transportation Company, and Ervin Schwecke, office manager of Valley Express Company, both testified that large quantities of magazines were delivered by their respective companies from West Coast in Fresno to East Bay in Oakland or Emeryville and to L S Distributors in San Francisco.

Hadley Roff, a reporter for the News-Call Bulletin, testified that he conversed with Aday, Meehan and

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[20]The witness identified the pictures marked Exhibits 103, 104 and 105 as being a Fair representation of the exterior and interior building at this address.

Maxey[21] on September 9, 1960 in Fresno, California, at the offices of Mid-Tower; that Aday and Maxey were both generally present during the conversation; that Aday told him Mid-Tower published the Saber and Fabian books, that he had edited many of the books, that he had made literary judgments on the material, and that he was in sum a "jack-of-all-trades. . . ." Roff also stated that while he was there, he observed Maxey working in the office on a ledger and referring to a file which contained invoices for West Coast. Roff testified further that Maxey told him that he was an officer in the organization, and when asked in what capacity he functioned replied, " 'Well, I do a little of everything.' " A postal inspector, Max T. Morrison, testified that Aday told him in March of 1959 that he was the author of numerous Fabian and Saber books; that he authored most of the books sent through the mails; that he edited his own books, and that he distributed his books through wholesale dealers with whom he had accounts, shipping large quantities by truck and smaller quantities through the mails.

Charles Ryken, an inspector in the Alameda County District Attorney's office, testified that he spoke to Meehan on August 3, 1960 at the West Coast office in Fresno; that Meehan told him he was president of West Coast, which distributed the book "Sex Life of a Cop," and that any books that were published by Mid-Tower

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[21]Roff identified pictures of Aday and Maxey [exs. 74 and 75].

were distributed by West Coast; Meehan told Ryken that he worked for Mid-Tower, which was the "sole assembly plant"; that Maxey was the president of Mid-Tower; that Aday was the sole owner of both West Coast and Mid-Tower; that Swift had an exclusive franchise for the distribution of books received from West Coast; that most of such books, including "Sex Life of a Cop," were delivered by common carrier to San Francisco and Oakland; and that "Sex Life of a Cop" was printed by American. Ryken also testified that Maxey was in the outer office at the time and that he observed a photograph of Swift in Meehan's office with the inscription " 'Greetings and Best Wishes for the holiday season. Louis Swift.' " Ryken stated that Meehan remarked that he and Swift were close friends.

A Deputy District Attorney for Alameda County, William Ahern, testified that on September 16, 1960 he spoke to Lindsay at 2919 East Belmont Avenue in Fresno; that Lindsay told him he was an associate editor of Mid-Tower and Vega books; and that he and Aday edited the Fabian, Saber and Vega books, including "Sex Life of a Cop" and "Joy Killer." Ahern further testified that on July 26, 1960 he spoke with Swift in Hayward, California; that Swift told him he was the owner of the company that had distributed "Sex Life of a Cop" and "Joy Killer" in Alameda County; that Swift told him that he had been informed by the district attorney's office at the end of 1959 that the Fabian and Saber books were obscene and should be removed from retail outlets in Oakland and that he had complied with

this request. It was also Ahern's testimony that at the time of his conversation with Swift a prosecution was pending in Hayward against retail sellers of the subject books, and that Swift told him that he was in the Hayward area "to see what went on regarding the retail outlets where he had distributed these books."

In the case at bench the grand jury had before it sufficient competent evidence to support the charge of conspiracy against all defendants. The books in question were read to the jury. As hereinbefore stated, our State Supreme Court in *Aday v. Superior Court* has held that from its examination of the books there is probable cause for believing that they are obscene. There is sufficient evidence showing that defendants Aday, Maxey and Lindsay were actively engaged in the publication and distribution of the books in question through the four closely connected corporations. Fabian, Mid-Tower and West Coast were located at the same address. Aday was the secretary-treasurer of each of the corporations, and the sole stockholder of Vega, Mid-Tower and West Coast. Maxey was an officer of Fabian, Mid-Tower and West Coast, while the codefendant Meehan, since deceased, was an officer of all four corporations. These defendants were all observed actively working in the office of the corporations located on Belmont Avenue in Fresno. The four corporations used the same accountants. There was evidence from which the grand jury could reasonably infer that these four corporations were interlocked in their business dealings and that they functioned through the activities of these defendants.

Insofar as Swift is concerned, the evidence shows that he had the exclusive distributorship in San Francisco and Alameda County of the books published by these corporations, and that he did in fact distribute the books published by Vega, Fabian and Mid-Tower, including the subject books, to retail outlets in Alameda County. From these facts the jury could reasonably draw the inference that the relationship between defendants was more than that of mere association and that each was interested in the distribution of the two books and actively participated in their dissemination.

The evidence was sufficient to justify the belief, moreover, that defendants knew the contents of the books. As hereinabove stated, in order that there be a violation of section 311 of the Penal Code there must be scienter. The element of scienter required is knowledge by defendants of the contents of the two books. (Smith v. California, supra, 361 U.S. 147, 149; People v. Harris 192 Cal.App2.d Supp. 887, 892.) We are not here concerned with whether defendants had knowledge of the contents of the two books beyond a reasonable doubt justifying a conviction for violation of section 311, but whether there is a *strong suspicion* that they knew of such contents. In view of the close relationship between Aday, Maxey and Lindsay, and the fact that they were engaged in the business of publishing books, it is reasonable to assume that each was aware of the contents of the two books. The same assumption can be drawn with reference to Swift, whose

business is that of distributing books to retail outlets. Accordingly, there is probable cause to determine that persons who know the contents of a book "would realize that such material could reasonably be regarded as obscene in character." (Aday v. Superior Court, supra, p. 798.)

We are satisfied, therefore, that the grand jury was justified in the belief that an understanding or agreement had been entered into between defendants to carry out the common purpose of violating section 311 of the Penal Code. With respect to the 10 overt acts charged in the indictment[22] to support the conspiracy, the first 8 have reference to the delivery of the books in question. The "First Overt Act," the "Third Overt Act," and the "Sixth Overt Act" allege the delivery by Aday, Maxey, Meehan and Lindsay of a quantity of the two books to Swift, doing business as East Bay, for distribution and sale in Alameda County. The "first" and "Sixth" allege a delivery of the two books on October 28, 1959, and May 25, 1960, respectively; the "Third" of the delivery of "Joy Killer" on April 28, 1960. The "Fourth Overt Act" charges a delivery by Swift of a quantity of "Joy Killer" to Adler's Smoke Shop in Alameda County on May 6, 1960; the "Fifth Overt

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[22]The indictment originally charged 11 overt acts. The "Second Overt Act" involving an allegation with reference to the book entitled "Decisive Years" was stricken by the trial court. In discussing the alleged overt acts we shall refer to them by the same numerical designation as appears in the indictment.

Act," of a delivery by Swift of quantities of the same book on the same day to retail outlets in Alameda County including Bellak's News Stand; the "Seventh Overt Act," of a delivery by Swift of a quantity of "Sex Life of a Cop" to Town and Country Liquors on May 26, 1960; and the "Eighth Overt Act" and "Ninth Overt Act," of deliveries by Swift of a quantity of the two books on May 26, 1960 to Southgate Liquors and Willis Liquors, respectively. The "Tenth Overt Act" alleges the sale on June 2, 1960 of copies of "Sex Life of a Cop" and "Joy Killer" to Vernon Lippold by Southgate Liquors; and the "Eleventh Overt Act" alleges the sale of said books to Lippold by Willis Liquors on the same day.

The "Tenth" and "Eleventh" alleged overt acts were not committed by any of the defendants and hence were not supportive of the indictment. The other alleged overt acts, however, find support in the record. These consist of the deliveries of the books in question. There is sufficient evidence from which the grand jury could reasonably infer that Aday, Meehan, Maxey and Lindsay caused quantities of the subject books to be delivered to common carriers through West Coast for consignment to East Bay. Proof thereof finds support in the testimony of Abel, Lennon, Schwecke, Ryken and Ahern. With respect to the delivery of the books to the designated retail outlets in Alameda County, the supportive evidence is found in the testimony of the following witnesses: Danis as to Adler's Smoke Shop; Ernest Bellak and Danis as to Bellak's News Stand; Vlahos as

to Town and Country Liquors; Bender, Abel and Danis as to Southgate Liquors; and Bradberry, Abel and Danis as to Willis Liquor Store. As hereinabove stated, since members of a conspiracy are bound by all the acts of all the members done in furtherance of the agreed plot, an overt act done by one of the members is sufficient. (See People v. Phillips, 186 Cal. App. 2d 231, 244; People v. Carter, 192 Cal.App.2d 648, 658.)

We are not unmindful that the prosecution failed to establish that the respective deliveries took place on the *actual* dates alleged in the indictment. We do not believe, however, that such failure was fatal to the issue of probable cause. It was not necessary for the People to have alleged in the indictment the exact time of the commission of the overt acts because, excepting insofar as the statute of limitations is concerned, the precise time of the commission of an overt act is not a material ingredient of the offense of criminal conspiracy. (See Pen. Code, §§ 955 and 959, subd. 6; and see People v. Barreras, 181 Cal.App.2d 609, 614; People v. Cantu, 216 A.C.A. 901, 908.) The overt act marks the commission of the crime and fastens criminal liability upon the conspirators; and where the conspiracy charged is a continuing one the period of limitation begins to run with the commission of the last overt act alleged. (People v. Crosby, 58 Cal.2d 713, 728.) Furthermore, the indictment in the present case alleges that deliveries were made "in pursuance of said conspiracy and to effect the objects thereof" and "on or about" the date

alleged in each specification of the overt acts. The term "on or about" is used synonymous with approximately. (State v. Lee (Ore.) 276 P.2d 946, 950; State v. Pace (Ore.) 212 P.2d 755, 758; United States v. Reisley, 32 F.Supp. 432, 434-435; see Passow & Sons v. Harris, 29 Cal.App. 559, 562.) There is respectable authority, moreover, to the effect that, except where time is an ingredient of the offense, the state is not bound by an allegation of "on or about" in an indictment as to the date of the commission of the offense, but may rely on any date within the period of limitation. (Thompson v. United States, 283 F. 895, 897; United States v. Reisley, supra, pp. 434-435; Ellis v. State (Tex.) 318 S.W.2d 655, 656; State v. Pace, supra, p. 759; State v. Guillot (La.) 9 So.2d 235, 239; see 13 Am. Jur. 2d, Burglary, § 34.) In *Thompson* we find the following statement: "Ordinarily, proof of the commission of the crime any day before the finding of the indictment and within the statute of limitations will be sufficient. [Citations.] A judgment may be sustained by proof of the commission of the crime or crimes before the indictment was found on dates other than those mentioned in the indictment. [Citation.] A fortiori when a precise date had not been named, proof of the commission of the crime on other days, than the one approximately mentioned is admissible." (P. 897.) In the case at bench the evidence presented to the grand jury was such as to justify the belief that the respective deliveries were made at approximately the times alleged, and certainly within the

three-year period of limitations.[23] (Pen. Code, § 800; People v. Crosby, supra, p. 722; Davis v. Superior Court, 175 Cal.App.2d 8, 21-22.)

The order setting aside the indictment is reversed.

Molinari, J.

We Concur:

Bray, P. J.

Sullivan, J.

[23]The indictment in the present case charges that defendants conspired from "on or about" April 3, 1959 to the filing of the indictment on October 25, 1960.

APPENDIX B.

Opinion of the California Supreme Court.

In the Supreme Court of the State of California in Bank.

Sanford E. Aday, et al., Petitioners, v. The Superior Court of Alameda County, Respondent. S.F. 20619.

Filed May 11, 1961.

Petitioners, book publishers and distributors whose principal place of business is Fresno, applied to the District Court of Appeal for a writ of mandamus to compel the Superior Court of Alameda County to return to them property taken under an assertedly invalid search warrant. Relief was denied without opinion, and following a petition to this court for hearing we issued an alternative writ.

On September 16, 1960, Charles Ryken, a police officer from Alameda County, requested the Honorable Dan B. Eymann, Judge of the Municipal Court of the Fresno Judicial District, to issue a search warrant and the officer executed an affidavit stating that petitioners committed a felony in Alameda, San Francisco, and Fresno counties in that they conspired to wilfully and lewdly publish, print, and sell "obscene and indecent writings, papers and books, to wit, '10:04 Sgt. Thorne', also known as 'Sex Life of a Cop', and 'Joy Killer', among others" (Pen. Code, §§ 182, 311, subd. 3).[1] Copies of the two named books were attached to

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[1]Section 182 of the Penal Code provides in effect that, if two or more persons conspire to commit any misdemeanor other than one constituting a crime against the person of specified governmental officials, they are punishable by imprisonment in the county jail for not

and made part of the affidavit, and it was stated that they had been purchased in Hayward by a police officer of that city. The affidavit also contained statements from which it appeared that one of the named books was published by petitioner Vega corporation and the other by petitioners Saber corporation and Mid-Tower corporation and that both books were assembled at one Fresno address and were distributed by petitioner West Coast News Company, which was the distributor of all Vega and Saber books. It was further averred that Mid-Tower was the "publisher of Saber Books," that one of the individual petitioners, Sanford E. Aday, was the sole owner of Mid-Tower and Vega, that Aday and another petitioner, Matthew Meehan, were officers of these two corporations and of West Coast, and that the third individual petitioner, Wallace Maxey, was an officer of Vega and West Coast.

In requesting that a warrant issue commanding the search of the persons of the individual petitioners and certain premises in Fresno, the affiant stated that he had probable cause to believe, and did believe, that there were in the possession of these individuals and on the premises described the following articles which were

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more than one year, or in the state prison for not more than three years, or by a fine not exceeding five thousand dollars or both.

Section 311 of the Penal Code provides: "Every person who wilfully and lewdly, either: . . . 3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; . . . is guilty of a misdemeanor."

used as a means of committing a felony: 1. "Checks, check stubs, cancelled checks, check books and bank statements." 2. "Sales records and purchase records." 3. "Customers' correspondence and customers' orders." 4. "Invoices." 5. "Bills." 6. "Vouchers." 7. "Statements." 8. "General ledgers, cash receivable ledgers, cash disbursement ledgers, subsidiary accounts receivable ledgers and subsidiary accounts payable ledgers." 9. "Mailing lists." 10. "Duplicate copies of federal and state income tax returns" of the individual and corporate petitioners "for the year 1959." 11. "Articles of Incorporation." 12. "Minutes of the board of directors." 13. "Stockholder records." 14. "Corporate records" of the corporate petitioners. 15. "Corporate records, papers, correspondence, sales receipts and bills of lading having to do with" the corporate petitioners. 16. "Books and magazines, including 'Sex Life of a Cop' also known as '10:04 Sgt. Thorne', and 'Joy Killer', but not limited thereto." 17. "Model releases, writings, stories, cartoon and advertisements." 18. "Contracts." 19. "Any and all other records and paraphernalia connected with" the business of the corporate petitioners.

Judge Eymann, after reading portions of the two named books, issued a warrant reciting that proof had been made by Ryken's affidavit that petitioners had conspired as alleged and that the 19 categories of property described in the affidavit (which were set forth in the warrant) were used by petitioners as a means of committing the felony. The warrant stated that there was probable cause to believe that the described property was concealed upon the persons of the individual petitioners and the premises at two Fresno addresses, namely, the address of Mid-Tower and the address of

the building where the two named books, as well as all books published by Vega, were assembled, and it commanded that the executing officers search these persons and premises for the property.

Police officers of Fresno and Alameda counties, acting under the general direction of Deputy District Attorney Ahern of Alameda County, went with the warrant to the addresses specified in it and conducted a search of those premises for approximately eight hours. The officers seized thousands of copies of the two books named in the affidavit and the warrant. Sample copies of over 50 other books were also taken, as well as certain photographs and magazines. A great variety of papers and records were seized including orders, invoices, letters, checks and a checkbook, savings account books, articles of incorporation, ledgers, manuscripts, blank tax returns, and lists of dealers, news agencies and accounts. The property was brought on the evening of September 16 to the home of Judge Eymann, and he ordered that it be taken to the Fresno jail.

On September 19 petitioners served and filed with the magistrate a traverse of the grounds for issuance of the warrant and a notice of a motion for restoration of the seized property pursuant to the provisions of sections 1539 and 1540 of the Penal Code.[2] They claimed

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[2]Section 1539 of the Penal Code provides: "If the grounds on which the warrant was issued be controverted, he [the magistrate] must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in section 869."

Section 1540 of the Penal Code provides: "If it appears that the property taken is not the same as that described in the warrant, or that there is no probable

that the warrant was invalid and that in any event property was taken which was not the same as that described in the warrant. A hearing was commenced that morning before Judge Eymann and was continued until September 20 at the request of petitioners. Later on September 19 Ahern obtained an order from the Honorable Charles Wade Snook, Judge of the Alameda County Superior Court, directing that the seized property be brought to Alameda County, and this was done in the evening of the same day. Judge Eymann was not consulted but was informed that evening by Ahern of what had occurred. On September 20 the magistrate talked by telephone to Judge Snook, who stated that in his opinion the removal of the property to Alameda County was legal, that he intended to have the property presented to the Alameda County grand jury the next day, and that he was aware that no hearing on the validity of the search and seizure had been held in Fresno. Judge Eymann was of the view that the presence of the property in Fresno was essential in order to proceed with the hearing, and, over the objections of petitioners, the matter was continued until September 29.

Upon resumption of proceedings Ahern stated that it was impossible to present the property because it was still in the possession of the Alameda County grand jury, which would be in session until October 24. A hearing on the validity of the warrant was then held, and it was agreed that, if Judge Eymann should de-

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cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

termine that the warrant was valid, another hearing would be held on November 18 to pass upon the issue whether property not described in the warrant was taken. The magistrate determined the warrant was valid, and petitioners instituted this mandamus proceeding for the return of their property.

Article I, section 19, of the California Constitution reads: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue, but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." Section 1525 of the Penal Code provides: "A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property and the place to be searched." (See also Pen. Code, § 1529 [requiring "reasonable particularity" of description].)

Aside from the reference to copies of the 1959 federal and state income tax returns of petitioners and the naming of the two books attached to the affidavit, the description in the warrant before us consisted of a number of broad, general categories, the last of which embraced "any and all other records and paraphernalia" connected with the business of the corporate petitioners. Articles of the type listed in general terms in the warrant are ordinarily innocuous and are not necessarily connected with a crime. The various categories, when taken together, were so sweeping as to include virtually all personal business property on the premises and placed no meaningful restriction on the things to be seized. Such a warrant is similar to the general warrant

permitting unlimited search, which has long been condemned. (See People v. Berger, 44 Cal. 2d 459, 461.)[8] The early case of Entick v. Carrington, 19 Howell's State Trials 1029 (1765), held that a warrant which authorized the seizure of defendant's "books and papers" was too general and was invalid, and this court has held that a reference in a warrant to property as "personal goods and property, to-wit, certain paraphernalia," without any further specification, does not satisfy the requirement of reasonable particularity of description (People v. Mayen, 188 Cal. 237, 242.) The warrant in the present case did not comply with that requirement except with regard to the 1959 income tax returns and the two named books, and therefore it did not constitute legal authorization to search for and seize the articles that were insufficiently described.

The warrant was invalid with respect to the copies of the federal and state tax returns because they were privileged and therefore exempt from seizure. (Webb v. Standard Oil Co., 49 Cal. 2d 509, 512-514.) It was held in the Webb case that the provisions of the Revenue and Taxation Code disclose an intent to preserve the secrecy of tax returns except in a few specified situations (Rev. & Tax. Code, §§ 19282-19287) and that, where federal returns may be assumed to con-

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[8]In 1761 James Otis declared the infamous writs of assistance, which permitted officers in their discretion to search premises for smuggled goods, to be "the worst instruments of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book" since they placed "the liberty of every man in the hands of every petty officer." (See Boyd v. United States, 116 U.S. 616, 625.)

tain the same information as is sought from state returns, forcing disclosure as to either will defeat the purposes of the code. While that case involved only the sections of the code relating to personal income taxes, there are substantially identical provisions with respect to corporation taxes. (Rev. & Tax. Code, §§ 26451-26453c.) The sole exception permitting disclosure for purposes of a criminal prosecution appears in sections 19283 and 26453, which are limited to prosecutions for tax violations, thereby indicating that disclosure is not to be made in other criminal cases.

Although the warrant was defective in the respects noted, it does not follow that it was invalid as a whole. Such a conclusion would mean that the seizure of certain articles, even though proper if viewed separately, must be condemned merely because the warrant was defective with respect to other articles. The invalid portions of the warrant are severable from the authorization relating to the named books, which formed the principal basis of the charge of obscenity. The search for and seizure of these books, if otherwise valid, were not rendered illegal by the defects concerning other articles. (Cf. United States v. Nine 200-Barrel Tanks of Beer, 6 F. 2d 401, 402; United States v. Bell, 48 F. Supp. 986, 997.) In so holding we do not mean to suggest that invalid portions of a warrant will be treated as severable under all circumstances. We recognize the danger that warrants might be obtained which are essentially general in character but as to minor items meet the requirement of particularity, and that wholesale seizures might be made under them, in the expectation that the seizure would in any event be upheld as to the property specified. Such an abuse of the warrant procedure, of course, could not be tolerated.

The question is also presented whether Ryken's affidavit showed probable cause for believing petitioners to be guilty of conspiring to publish and distribute obscene books. Because of the dangers inherent in all censorship, the requirement of probable cause is especially important where, as here, freedom of speech and press is involved, and great caution must be exercised before permitting the seizure of books on the ground of obscenity. In the past, many works that are truly great have been banned, and it is obvious that censorship which is too rigid may impoverish the intellectual life of the community. (See United States v. One Book Entitled Ulysses, 72 F. 2d 705, 708; Bantam Books v. Melko [N.J. Superior Court], 96 A. 2d 47, 52 (mod. and aff'd, 103 A. 2d 256); Paul and Schwartz, Obscenity in the Mails, 106 U. Pa. L. Rev. 214. 218; Chafee, Free Speech in the United States (1948) pp. 529 et seq.) The literary, educational, scientific, or other social values of a book alleged to be obscene are to be taken into consideration, and a book lacking these qualities is more likely to be condemned than one possessing them. (See Parmelee v. United States, 113 F. 2d 729, 735; United States v. One Book Entitled Ulysses, 72 F. 2d 705, 706-708; American Civil Liberties Union v. The City of Chicago [Ill.], 121 N.E. 2d 585, 592; Bantam Books v. Melko [N.J. Superior Ct.], 96 A. 2d 47, 52-63 (mod. and aff'd, 103 A. 2d 256); Lockhart and McClure, Censorship of Obscenity, 45 Minn. L. Rev. 5, 95-99; Lockhart and McClure, The Law of Obscenity, 38 Minn. L. Rev. 295, 343, 348.)

Recently the United States Supreme Court defined obscene material as that which deals with sex in a manner appealing to prurient interest; it rejected the standard of judging obscenity by the effect of an isolated

excerpt upon particularly susceptible persons and adopted instead the test "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." (Roth v. United States, 354 U.S. 476, 487-489.) It should be emphasized that in applying these principles here we are concerned only with probable cause, not with the final determination as to the character of the named books or the guilt of petitioners. An examination of the two books convinces us there was probable cause for believing that they are obscene. Their text is such that an average person, applying contemporary community standards, could reasonably believe that their dominant theme appeals to a lascivious, shameful, and morbid interest in sex and that they are totally lacking in redeeming value, literary or otherwise. In view of their contents it was not necessary for Judge Eymann to read the books in their entirety or receive evidence as to contemporary community standards in order to determine the issue of probable cause.

The facts set forth in the affidavit are sufficient to warrant the belief that the petitioners involved in the publication and distribution of the named books were acting in concert. In view of the close relationship existing among them it may be assumed that all of them were aware of the contents of the two books, and there is probable cause to determine that persons who knew the contents of the books would realize that such material could reasonably be regarded as obscene in character.

Since there was probable cause to believe that the named books were used or were intended to be used as

a means of committing the alleged offense, all copies on the premises could be seized under subdivisions 2 and 3 of section 1524 of the Penal Code unless, as urged by petitioners, the seizure constituted a previous restraint violating the constitutional guaranty of free speech and press.[4] Obscenity is not protected by the Constitution (Roth v. United States, 354 U.S. 476, 481, 486), and, although previous restraint upon publication is in general prohibited, some exceptions have been recognized, among which is that "the primary requirements of decency may be enforced against obscene publications" (Kingsley Books, Inc. v. Brown, 354 U.S. 436, 440; see Chaplinsky v. New Hampshire, 315 U.S. 568, 571-572; Near v. Minnesota, 283 U.S. 697, 716). The Kingsley Books case upheld a New York statute providing for a civil suit to enjoin an obscene publication and for surrender and destruction of the obscene material upon entry of a final injunction. The opinion held that, in order to prevent frustration of judicial condemnation of obscene matter, a preliminary injunction could properly be issued for the period during which the question of obscenity is tried in an adversary proceeding complying with the requirements of due process. (354 U.S. at p. 440.)

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[4]Section 1524 of the Penal Code provides in part: "A search warrant may be issued upon any of the following grounds: . . . 2. When the property or things were used as the means of committing a felony. 3. When the property or things are in the possession of any person with the intent to use it as a means of committing a public offense. . . . The property or things described in this section may be taken on the warrant from any place, or from any person in whose possession it may be."

The seizure of all copies of an allegedly obscene book is not invalid if made on probable cause and if the owner of the book has adequate remedies by which to litigate the issue of obscenity. Where, as, here, the seizure occurs under a warrant, an ex parte determination of the issue of obscenity, so far as probable cause is concerned, has taken place before issuance of the warrant, and immediately after the seizure a determination of the issue to that extent can be obtained in adversary proceedings by controverting the warrant under sections 1539 and 1540 of the Penal Code. In the event the owner is unsuccessful in that proceeding, a final determination as to obscenity will be had in the criminal action which will ordinarily follow within a reasonable time, or other remedies such as mandamus will be available to secure return of the property. (Stern v. Superior Court, 76 Cal. App. 2d 772, 780, 784; Atlas Finance Corp. v. Kenny, 68 Cal. App. 2d 504, 505 et seq.; see People v. Phillips, 163 Cal. App. 2d 541, 545.) These various remedies satisfy the requirements of due process, and the taking of all copies of the named books did not violate freedom of speech and press.

The warrant constituted valid authorization for the search and seizure with respect to the named books but not with respect to the other property referred to in the warrant. It should be noted, however, that if any of the property seized other than the named books was contraband, petitioners are not entitled to its return. (Steele v. United States No. 1, 267 U.S. 498, 503, 505;

United States v. Old Dominion Warehouse, 10 F. 2d 736, 737-738.) Any property in possession of petitioners in violation of section 311 of the Penal Code was, of course, contraband. The seized property other than the named books is not before us, and, although much of it obviously was not contraband, it may be that some of it was. We are therefore unable to determine whether all the property other than the named books must be returned to petitioners or whether some of it is to be withheld. Additional proceedings will be necessary in order to make that determination, and they should be had in the municipal court in Fresno. Proceedings controverting the warrant were pending there in accordance with sections 1539 and 1540 of the Penal Code when respondent superior court ordered the removal of the seized articles to Alameda County. Those proceedings were commenced immediately after the seizure and could have been concluded expeditiously but for the removal of the property from Fresno. Under the circumstances present here, the action of respondent superior court was improper; it cannot be reconciled with orderly procedure and was not authorized by the code provisions applicable to searches and seizures made under a warrant. (Pen. Code, §§ 1523-1542.) The purpose of sections 1539 and 1540 is to provide one whose property is seized with a speedy remedy in a readily accessible court, and that purpose may be frustrated by removal of seized property to another county during the pendency of the proceedings provided for in those sections. The irregularity in procedure, however, did not

operate retroactively to affect the validity of the search and seizure and has no bearing on our decision concerning return of seized property.

Let a peremptory writ of mandate issue directing respondent court to return all the seized property, except the copies of the books named in the warrant, to the municipal court of the Fresno Judicial District for further proceedings in accordance with the views expressed in this opinion.

Gibson, *C. J.*

We Concur:

Traynor, *J.*
Schauer, *J.*
McComb, *J.*
Peters, *J.*
White, *J.*
Dooling, *J.*

APPENDIX C.

Constitutional and Statutory Provisions Involved.

1. The pertinent provisions of the First Amendment to the United States Constitution are:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press; . . ."

2. The provisions of the Fourth Amendment to the United States Constitution are:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

3. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

4. California Penal Code, §182, provides in pertinent part as follows:

> "If two or more persons conspire
>
> 1. To commit any crime. . .
>
> * * *
>
> "They are punishable as follows:
>
> * * *"

5. California Penal Code, §311, prior to September 15, 1961, provided in pertinent part, as follows:

"Every person who wilfully and lewdly, either:

* * *

"3. Write, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; . . . is guilty of a misdemeanor."

6. California Penal Code, §311, effective September 15, 1961, provides in pertinent part as follows:

"As used in this chapter:

"(a) 'Obscene' means that to the average person, applying contemporary standards, the predominant appeal of the matter, taken as a whole, is to prurient interests, i.e., a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation of such matters and is matter which is utterly without redeeming social importance. . . ."

7. California Penal Code, §938.1, provides in pertinent part as follows:

"If an indictment has been found or accusation presented against a defendant, such stenographic reporter shall certify and file with the county clerk an original transcription of his shorthand notes and a copy thereof and as many additional copies as

there are defendants, other than fictitious defendants, regardless of the number of charges or fictitious defendants included in the same investigation. The reporter shall complete such certification and filing within 10 days after the indictment has been found or the accusation presented unless the court for good cause makes an order extending the time. The time shall not be extended more than 20 days. The county clerk shall deliver the original of the transcript so filed with him to the district attorney immediately upon his receipt thereof, shall retain one copy for use only by judges in proceedings relating to the indictment or accusation, and shall deliver a copy of such transcript upon each such defendant or his attorney.***"

8. California Penal Code, §936.6 provides as follows:

"In the investigation of a charge, the grand jury shall receive no other evidence than such as is given by witnesses produced and sworn before the grand jury, furnished by legal documentary evidence, or the deposition of a witness in the cases mentioned in subdivision 3 of Section 686. The grand jury shall receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence."

9. California Penal Code, §939.8 provides as follows:

"The grand jury shall find an indictment when all the evidence before it, taken together, if unexplained or uncontradicted, would, in its judgment, warrant a conviction by a trial jury."

10. California Penal Code, §995, provides in pertinent part as follows:

> "The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:
>
> "If it be an indictment:
>
> 1. Where it is not found, endorsed, and presented as prescribed in this code.
>
> 2. That the defendant has been indicted without reasonable or probable cause:
>
> * * *"

11. California Penal Code, §1539, provides as follows:

> "If the grounds on which the warrant was issued be controverted, he must proceed to take testimony in relation thereto, and the testimony of each witness must be reduced to writing and authenticated in the manner prescribed in Section 869."

12. California Penal Code, §1540, provides as follows:

> "If it appears that the property taken is not the same as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the magistrate must cause it to be restored to the person from whom it was taken."

APPENDIX D.

(Title of Court and Cause)

Search Warrant.

The People of the State of California to Any Sheriff, Constable, Marshal or Policeman in the County of Fresno, State of California:

Proof by affidavit having been made this day before me by Charles H. Ryken, that heretofore and on or about the 2nd day of June, 1960, and for a continuous period of several months prior thereto, in the City of Hayward, County of Alameda, State of California, the crime of felony, to wit, a violation of Section 182 of the Penal Code of California, conspiracy, was committed by Sanford E. Aday, Wallace De Ortega Maxey, Matthew J. Meehan, Nancy Brooks, Louis R. Swift, Sebastian W. Abel, Oscar Peck, Ralph Brandon, Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books, Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News Company, Inc., L-S Distributors, East Bay News Co., American Printing and Lithographing Co. and other unknown persons, in the manner following, to wit: That the aforementioned persons, corporations, companies, partnerships, joint venturers and other unknown persons did conspire to violate Section 311, Subdivision 3 of the Penal Code of California, in that they did wilfully and lewdly write, compose, stereotype, print, publish, sell, distribute and keep for sale and exhibit, obscene and indecent writings, papers and books, to wit, "10.04 Sgt. Thorne", also known as "Sex Life of a Cop", and "Joy Killer", among others;

That there were used by the said Sanford E. Aday, Wallace De Ortega Maxey, Matthew J. Meehan, Nancy

Brooks, Louis R. Swift, Sebastian W. Abel, Oscar Peck, Ralph Brandon, Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books, Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News Company, Inc., L-S Distributors, East Bay News Co., American Printing and Lithographing Co. and other persons, that it is intended that there be used as a means of committing said felony, to wit, a violation of Section 182 of the Penal Code of California, the following described articles and property:

1. Checks, check stubs, cancelled checks, check books and bank statements.
2. Sales records and purchase records.
3. Customers' correspondence and customers' orders.
4. Invoices.
5. Bills.
6. Vouchers.
7. Statements.
8. General ledgers, cash receivable ledgers, cash disbursement ledgers, subsidiary accounts receivable ledgers and subsidiary accounts payable ledgers.
9. Mailing lists.
10. Duplicate copies of federal and state income tax returns of Sanford E. Aday, Wallace De Ortega Maxey, Matthew J. Meehan, Nancy Brooks, Oscar Peck, Ralph Brandon, Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books, Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News Company, Inc. for the year 1959.
11. Articles of Incorporation.
12. Minutes of the board of directors.
13. Stockholder records.

14. Corporate records of Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books, Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News Company, Inc.

15. Corporate records, papers correspondence, sales receipts and bills of lading having to do with Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books, Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News Company, Inc., L-S Distributors, East Bay News Co., American Printing and Lithographing Co., Louis R. Swift.

16. Books and magazines, including "Sex Life of a Cop" also known as "10:04 Sgt. Thorne", and "Joy Killer" but not limited thereto.

17. Model releases, writings, stories, cartoon and advertisements and manuscripts.

18. Contracts.

19. Any and all other records and paraphernalia connected with the aforementioned businesses of Mid-Tower Publishing Corp., Vega Books, Inc., Fabian Books Ltd., Versatile Publishing Corp., Sunset Enterprises, Saber Books, West Coast News Company, Inc.

That there is just, probable and reasonable cause to believe and said affiant does believe that the above articles and property are now concealed upon the persons and in and upon those certain premises, including all rooms and buildings used in connection with the premises and adjoining the same, and in any receptacle or safe therein, which premises are commonly called and designated as 2919 E. Belmont Avenue, Fresno, California, a commercial building used for the publication of books, and 2921 E. Belmont Avenue, Fresno,

California, a commercial building used for the publication of books.

YOU ARE THEREFORE COMMANDED in the daytime to make immediate search on the persons of Sanford E. Aday, Wallace De Ortega Maxey, Matthew J. Meehan, Nancy Brooks, Oscar Peck and Ralph Brandon, and of the premises all above described for the said articles and property and if you find the same, or any part thereof, to bring it forthwith before me at the Municipal Court of Fresno Judicial District, County of Fresno, State of California, or bring said property before the Superior Court of the State of California in and for the County of Alameda, or hold such property in your possession under Section 1536 of the Penal Code of California, for disposition according to law.

Given Under My Hand and dated this 16th day of September, 1960.

Dan B. Eymann,
Judge of the Municipal Court.